Supreme Court, U.S.
FILED
OCT 7 1998
OFFICE OF THE CLERK

No. 98-260

In The

Supreme Court of the United States

October Term, 1998

ELLEN BYRD and VIVIEN HARKNESS,

Petitioners,

v.

VIC CANTU, MARK VAN HOLT, and CITY OF LOS ALAMITOS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY ON PETITION FOR WRIT OF CERTIORARI

Petitioners submit this reply to respondents' Opposition to Petition for Writ of Certiorari.

QUESTIONS PRESENTED AND NOT PRESENTED

Respondents incorrectly set forth the questions presented on this Petition at page i of their Opposition.

The questions actually presented are not those mistakenly set forth by Respondents, but are as follows:

1. In an action under 42 U.S.C. § 1983 (1982) based on a use of allegedly excessive, deadly force, what is the appropriate standard by which to judge police conduct, when the plaintiffs who assert such a claim derive their *standing* to sue from the Fourteenth Amendment? Is it the Fourth Amendment "reasonableness" standard, or is it the Fourteenth Amendment standard?

2. Under Rule 8(a)(2), (e), and (f), F.R. Civ. P., does a party making a claim under 42 U.S.C. § 1983 (1982) forfeit her claim when she fails to allege the legal conclusion she is a "successor in interest" to her decedent, when she has pled facts to support that legal conclusion.

The questions set forth by Respondents at page i of their Opposition are not properly before this Court because the time within which to petition for certiorari had expired, and Respondents did not file a cross-petition for certiorari. Therefore, Respondents are without the ability to put questions before this Court.

MATTERS SET FORTH BY RESPONDENTS ARE BOTH INACCURATE AND WITHOUT MERIT.

Petitioners track the order in which matters are set forth in the Opposition to address those matters on which Petitioners deem it appropriate to reply. The number in parenthesis that precedes each reply is a reference to the

page in the Opposition at which subject material is set forth.

1. (2-3) The comments about the Respondents' theory of a syndrome they dub "suicide by cop" is irrelevant to any issue raised in the Petition, and since it was information admittedly not had by Respondent police officers at the time of the fatal shooting of Petitioners' decedent, it has no bearing on any issue presented.

2. (3) Petitioners did not need to allege, *in haec verba*, they were their decedent's successors in interest, because it is not California rules of pleading that govern pleading in a federal forum, but rather it is federal rules of pleading that govern what Petitioners pled in this case.

It is both well-established and well-known that a plaintiff's well-pleaded allegations of fact are to be taken as true and all reasonable inferences are drawn in plaintiff's favor. *Leatherman v. Tarrant County narcotics Unit*, 507 U.S. 163, 164 (1993). Moreover, a complaint need not set forth even all relevant facts or recite the law; all that is required is a short and plain statement showing that the party is entitled to relief. F.R. Civ. P. 8(a); *Doherty v. City of Chicago*, 75 F.3d 318, 322 (7th Cir. 1996).

A plaintiff in a suit in federal court need not plead facts; conclusions may be pleaded as long as the defendant has at least minimal notice of the claim. F.R. Civ. P. Rule 8(a)(2); *Jackson v. Marion County*, 66 F.3d 151, 153-54 (7th Cir. 1995). Here, as Respondents admit at page three of their Opposition: "Respondents would also agree that Petitioners' [alleged] lack of standing to act as heirs [*sic*; should read *"successors"*] to decedent was appropriately raised as a twenty-seventh affirmative defense in the answer. . . . " Thus, Respondents expressly admit they had *"at least minimal notice of the claim* [made by Petitioners as successors in interest]."

It is unnecessary for a plaintiff specifically to identify the legal basis for a claim as long as *the facts alleged* – here, that Petitioners were, respectively, the surviving spouse and mother of decedent – would support relief. *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992).

Here, because Petitioners pled facts *which Respondents actually understood* to mean Petitioners were asserting standing as survivors of their decedent, Petitioners properly stated their survivorship claim in which they stood in their decedent's shoes to raise his Fourth Amendment unreasonable force claim.

3. (3) The second sentence of the second full paragraph on page three is garbled, Petitioners do not understand what it means, and therefore, are unable to respond to it (if a response would be appropriate).

4. (3) Respondents' contention of their intent to raise their thirtieth affirmative defense to a perceived "potential claim of discrimination" is at best ambiguous and at worst with no merit. Respondents knew full well that both decedent and his successors, Petitioners, all were of the white race, and thus there would have been no legitimate reason to raise this defense as a defense to a "potential claim of discrimination;" rather, the "protected class" readily can be read, in conjunction with Respondents' twenty-seventh affirmative defense, as a defense to the class of persons of successors in interest who have standing to assert their decedent's claims.

5. (4) The pre-trial conference order was not "prepared by Petitioners," but was, as is required by the applicable court rules, jointly prepared, and was, in fact, a joint submission, to which all parties agreed as to form and content.

6. (4) It is incorrect, as Respondents contend, that "[d]uring the trial Petitioners expressly relied on a representation to the court that there was 'no [federal] survival claim," and also it is incorrect, as Respondents contend, that "Petitioners again confirmed to the court that they were not asserting their own 4th Amendment claims. It was only after the court declared a mistrial and invited summary judgment on the issue of standing that Petitioners did a complete turnaround by attempting to establish some sort of 4th Amendment survival action which had never been previously alleged."

7. (4) It is not correct, as Respondents contend, that "the district court determined that the standard applicable to the 14th Amendment claims was 'deliberate indifference'. . . . " Rather, Petitioners remember it to be the case that, after the close of evidence, and immediately before summations were to have begun, the district court, *sua sponte*, opined it *did not know* the correct standard of culpability, that there should be, but was not, any appellate guidance on that issue, and then, on this basis, declared a mistrial. Moreover, the district court ruled that, in any event, Petitioners had forfeited any right they might have had to have the case proceed to the jury based on a standard of culpability of "deliberate indifference," since plaintiffs always had contended that, because the underlying wrong was an alleged use of unreasonable force during a seizure, the correct standard of culpability was the Fourth Amendment's "reasonableness" standard.

8. (5) Respondents' reasons for denying the Petition are without merit.

(1) Rule 16, F.R. Civ. P. has nothing to do with the issues presented in the Petition. No case stands for the proposition suggested, enthemymatically, that a plaintiff in a Section 1983 action must, procedurally, set forth her standing to sue in a pretrial conference order. The facts of

standing properly and adequately were set forth in the operative complaint. The pretrial conference order covered this issue at paragraph 7.2., Resp. App. at 3a, as an issue of fact: "Whether the alleged police conduct subjected plaintiff or plaintiffs to a deprivation of *any* federal rights." (Emphasis added.) There is no requirement that a pretrial conference order be more precise or elaborate than or contain more facts than a complaint, or set forth either facts of or the conclusion of standing. Respondents admit they knew Petitioners sued as, *inter alia*, successors in interest. Moreover, at paragraph 7.3., Resp. Ap. at 4a, Respondents, themselves, set forth the issue to be tried of "Whether the alleged force used was reasonable." This issue legally was pertinent only to a Fourth Amendment claim, and could be raised, by Respondents' contention, only by Petitioners in their capacities as successors in interest, standing in their decedent's shoes. Thus, again, Respondents acknowledged a Fourth Amendment claim, a claim that legally could be made *only* by Petitioners standing in their decedent's shoes as his successors in interest.

(2) Respondents' second stated reason to deny the Petition appears to be meaningless.

(3) Respondents' third stated reason to deny the Petition is without merit because, as the Ninth Circuit admits, Petitioners' evidence proved "deliberate indifference," and therefore, under this Court's holding in *Graham v. Connor*, 490 U.S. 386 (1989), the correct standard for all uses of force that arise from a Fourth Amendment-type seizure of the person is the Fourth Amendment "reasonableness" standard. Therefore, the district court and the court below erred by insisting that the correct standard was one of "deliberate indifference."

9. (5) Respondents' admission that "Petitioners arguably stated facts sufficient to have standing to bring separate claims in their own right[ ]" should be conclusive on the issue of the viability of Petitioners' claim on which they base their *standing* on the Fourteenth Amendment. This admission warrants summary reversal on this issue: that is, Petitioners' claim in which they base their *standing* on the Fourteenth Amendment should be remanded for trial.

10. (6) Respondents' suggestion that there is "controlling state law" that warranted Petitioners' setting forth the legally conclusory words "successors in interest" either in their complaint or in the pretrial conference orders is incorrect. It is *federal* law whose provisions govern pleading, and not state law, though state law principles determine *who has standing to assert a decedent's Fourth Amendment claims that survive death*. Federal pleading is "notice pleading," Respondents had notice, and that should end the issue.

11. (6) Respondents' contention that "at trial, Petitioners took advantage of the lack of any survival action . . . [and] acknowledged that there were no survival actions [,]" does not comport with Petitioners' recollection of what occurred. Petitioners always maintained that they proceeded on two claims: decedent's Fourth Amendment claim and their own claim, as individuals.

12. (6) Respondents' contention about Petitioners' "own tactical decisions" is incorrect, and the characterization of "such personalized tactical errors" also is incorrect.

13. (7) It is not correct that "[v]iewing the evidence most favorably to the Petitioners, the district court determined that Petitioners had failed to meet their burden of proof." What is correct is that the district court claimed it was baffled by what burden of proof to apply,

and it is correct that the Ninth Circuit then, for the first time, set the burden of proof as "deliberate indifference," while admitting that Petitioners had met their burden of proof, but still affirming the dismissal of Petitioners' claims. This error warrants summary reversal.

14. (7) It is not correct that "the application of Rule 8 was never raised . . . on appeal." Petitioners raised on appeal that they always properly had pled and preserved both of their claims for trial.

15. (8) "[T]he mandatory [state law] pleading provisions of *Code of Civil Procedure* § 377.32" simply are neither applicable, much less "mandatory," because state law rules of pleading are inapplicable in federal courts. Thus, nothing flows from this one of Respondents' contentions.

16. (8) Nothing flows from Respondents' argument that a plaintiff in a Section 1983 action in a federal forum in California either must plead or prove she is a "sole" survivor, and, in fact, the evidence at trial did prove Petitioners were their decedent's "sole" survivors.

17. (9) No case stands for the proposition that, once a party opponent is put on notice in a complaint of that for which she is sued, any more specificity than was set forth in the complaint must be set forth in a pretrial conference order, notwithstanding that a pretrial conference order supersedes pleadings. In any event, Petitioners incorporated by reference in the pretrial conference order their pleadings.

18. (10) Respondents' contentions about jurisdiction are confused. The part of the pretrial conference order to which they make reference has to do with *subject matter* jurisdiction, and not with personal jurisdiction or capacity to sue or standing.

19. (10) It is not correct that Petitioners "den[ied] the existence of any survival claims." Petitioners moved

to amend the pretrial conference order only to cure a situation that the district court, after the trial, claimed existed, and to prevent the manifest injustice that ultimately befell Petitioners. The pretrial conference order should have been amended so as to prevent the forfeiture of Petitioners' claims into which Petitioners were forced by the district court. There must have been substantial reason to deny a motion to amend, *see, e.g., Halliburton & Assocs. v. Henderson, Few & Co.*, 774 F.2d 441 (11th Cir. 1985), like "undue delay, bad faith, dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment[,]" *Foman v. Davis*, 371 U.S. 178, 182 (1962), and since here there was no substantial reason, much less good reason, to deny Petitioners' post mistrial motion to amend the pretrial conference order, and since none of the conditions enumerated in *Foman*, existed, the amendment should have been permitted. Instead, and with no reason at all, the district court caused a forfeiture of Petitioners' claims, when it could have permitted the amendment before a second trial, while providing Respondents with whatever relief might have been appropriate (though they would have needed no relief at all).

20. (12) It is not correct that the lower courts "simply exercised sound discretion," but it is correct that they erred as a matter of law.

21. (12) Respondents' issue No. 2 is both not properly before this Court and is absurd. Moreover, it is incorrect that "Petitioners agreed that the only individual claims they could maintain, if any, would arise out of the 14th Amendment." What Petitioners always contended is that their *standing* to bring their individual claims was based on that Amendment.

However, Petitioners do not object to the Court taking up this issue, because it is an important, unresolved issue of federal law.

22. (14) Respondents' misread *Graham v. Connor*. It is Petitioners' understanding of *Graham* that *all* uses of force that arise from stops and/or arrests are to be analyzed under the Fourth Amendment's reasonableness standard, without reference to standing. That Petitioners have *standing* to bring their personal claims under the Fourteenth Amendment has no bearing on which standard of culpability is to be applied to those claims.

23. (17) Petitioners never claimed they asserted vicariously their decedent's Fourth Amendment claims of excessive force; rather, Petitioners asserted their decedent's surviving excessive force claims and their own, personal claims, in which their standing was founded on the Fourteenth Amendment, but on which the standard of culpability is based on the Fourth Amendment.

24. (17-18) This Court never suggested that in cases founded on a stop or arrest in which excessive force is alleged the standard of culpability is "shocks the conscience." This Court did not say that in *County of Sacramento v. Lewis*, 521 U.S. ___, 118 S.Ct. 1708 (1988). *Graham* is to the contrary.

25. (18) The last full paragraph on page 18 is garbled, Petitioners do not understand it, and are unable to respond to it. However, Petitioners do not "attempt to create [any] illusion," because there *is* a conflict between the circuits, as set forth in the Petition.

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE IMPORTANT ISSUES.

At bottom of this case are these issues:

1. Should the basis for standing to bring a Section 1983 action also provide the standard of culpability by

which the alleged wrongful conduct is to be judged? The answer to this question is "no."

This Court's disposition of *Graham* clearly warrants that all claims of use of excessive force that arise from a police stop or arrest be evaluated under the Fourth Amendment's "reasonableness" standard. This Court should grant the Petition to address and to resolve this important issue, and to enforce its holding in *Graham*. The source of standing to bring as claim simply does not dictate the standard of culpability to be applied to that claim. To confuse the two is to engage in a category mistake.

2. Does federal pleading require the pleading of legal conclusions that flow from facts pled? The answer to this question is "no," and this Court should grant the Petition to resolve this issue in the context of Section 1983 actions, so that it will be clear that persons who sue, and who plead facts sufficient to provide notice of the capacities in which they sue, need not plead legal conclusions.

CONCLUSION

The Petition should be granted, or the disposition of the court below should be summarily reversed.

Respectfully submitted,

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